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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES H. REAGAN, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 755.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

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The plaintiff in error was convicted at the April term, 1894, of the district court of the United States for the western district of Texas on an indictment (No. 791 A) which charged that on the 4th day of April, 1893, he did, unlawfully, fraudulently, willfully, and knowingly, and with intent to defraud the United States of America, receive into his possession and conceal forty head of horned cattle subject to duty and which should have been invoiced; which cattle had then and there been unlawfully, willfully, and knowingly, and with intent to defraud

the United States revenues, smuggled and clandestinely introduced into the United States from the Republic of Mexico, by some person to the grand jury unknown, without paying or accounting for the duties by anyone; he, the said Reagan, then and there well knowing said cattle to have been smuggled.

ASSIGNMENT OF ERRORS.

These are four in number (pp. 12, 13) and will be considered in the order in which assigned.

I.

The court erred in refusing to allow to the defendant ten peremptory challenges to jurors, and in allowing to the said defendant only three peremptory challenges to jurors summoned to try the said defendant in the above-entitled cause.

From the bill of exceptions (pp. 13, 14) it appears that the motion to allow the defendant ten peremptory challenges was made on the ground that the offense with which said defendant was charged was a felony, and that under the provisions of section 819 the said defendant was, as a matter of right, entitled to ten peremptory challenges.

Section 3082, Revised Statutes, provides:

> If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, after importation, knowing the same to have

> been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, etc.

Section 819, Revised Statutes, provides:

> When the offense charged is treason, or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges, etc.

The argument for the plaintiff in error on this point being that in all cases of felony, not treason or a capital offense, the defendant is entitled to ten peremptory challenges. That this indictment charges plaintiff in error with a felony, because the offense with which he is charged is punishable by fine and by imprisonment for two years, if the court so direct. That such punishment is an infamous punishment; that, therefore, the offense was infamous, and, therefore, a felony.

We have been unable to find any decision of the Federal courts expressly applicable to this case. We find many, however, which afford suggestive analogies by which we may be aided in the inquiry suggested upon the point here raised.

A CRIME MAY BE INFAMOUS AND YET NOT A FELONY.

It is true this court has held (*ex parte Wilson*, 114 U. S., 429; *Mackin* v. *United States*, 117 U. S., 348, and *United States* v. *Petit*, 114 U. S., 429) that one charged with counterfeiting, or with passing counterfeit money

knowing it to be counterfeit, is charged with an infamous crime within the meaning of the fifth amendment of the Constitution, and can not be proceeded against by information, but only upon indictment or presentment.

And the same has been held as to one charged with smuggling, in violation of section 2865, Revised Statutes, because the punishment in this case is by imprisonment for two years. (*United States* v. *Johannesen*, 35 Fed. Rep., 411.)

And yet, while the punishment for counterfeiting under section 5457 is by a fine of not more than $5,000 and by imprisonment at hard labor not more than ten years, it has been expressly and repeatedly held that the offense of counterfeiting is a misdemeanor and not a felony, and that the accused is not entitled to ten peremptory challenges, but to only three. (*United States* v. *Coppersmith*, 2 Flip., 546, 4 Fed. Rep., 198; *United States* v. *Wynn*, 6 Fed. Rep., 886; *United States* v. *Daubner*, 17 Fed. Rep., 793.)

And while the offense of smuggling, under section 2865, has been held to be an infamous offense, to be proceeded for by indictment or presentment, yet is it by the same section expressly declared to be a misdemeanor and not a a felony.

In *United States* v. *Coppersmith*, *supra*, the subject is ably and exhaustively considered by Hammond, J., who concludes:

> Be this as it may, the clause under consideration may operate in other than capital cases to give the defendant ten challenges in the following classes of cases: *First*, where the offense is declared by statute

expressly or impliedly to be a felony; *second*, where Congress does not define an offense, but simply punishes it by its common law name, and at common law it is felony; *third*, where Congress adopts a State law as to an offense, and under such law it is a felony.

The offense charged in the indictment here of receiving and concealing smuggled goods, knowing them to have been smuggled, with intent to defraud the United States, is not declared a felony by statute, and the parent or principal offense of smuggling is declared by statute to be merely a misdemeanor.

Smuggling, or the concealing of smuggled goods, was not a felony, either at common law, or in England, at the time of the adoption of the Federal Constitution, except that by statutes aggravated cases of force or violence, or a combination of three or four persons armed with firearms, etc., were declared to be felonies. (2 Cooley's Black. Com., Book 4, 155; and see 6 Geo. IV, c. 108; 65 Stat., 741, secs. 44, 56–59; 3 and 4 Wm. IV, c. 533; Stat., 408, secs. 44–58.)

It has been held by the Supreme Court that when a common law term is used in a statute defining a crime, we must look to the common law to determine what Congress meant (*United States* v. *Palmer*, 3 Wheat., 610-630); and the common law of England as enlarged or modified by statutes in force at the time of the adoption of the Federal Constitution, must have been what was understood by the framers of the Constitution when crimes are referred to in the Constitution; and the term "felony" is several times employed in the Federal Constitution (Art. I, sec. 6; Art. IV, clause 2, sec. 2, Rev. Stat., 26, a decision

upon which last-mentioned clause may be found in 24 How., 66; see also Art. II, sec. 4, Rev. Stat., 24), and must undoubtedly be held to have its then understood meaning that an act was such an offense, if mentioned simply in the statute by its common law designation, and was punishable in England as a felony.

It is suggested that it was probably because of the use of the term "felony" in the Constitution that the revisers were unwilling to define the expressions "felony" and "misdemeanor." Congress has not declared the violation of section 3082 to be a felony, but in *ex parte Wilson* (114 U. S., 422) Mr. Justice Gray, in delivering the opinion of the court, said:

> Nor can we accede to the proposition, which has been sometimes maintained, that no crime is infamous within the meaning of the fifth amendment which has not been so declared by Congress.

But we do not understand this as affecting in any degree the definition given by Judge Hammond, in *United States* v. *Coppersmith*, of the classes of cases which are felonies under the law.

Bouvier, in his Law Dictionary, under the head of "Felony," says:

> In American law the word has no clearly defined meaning at common law, but includes offenses of a considerable gravity. In general, what is felony under the English common law is such under ours. (1 Bish. Cr. L., sec. 617.) The United States Revised Statutes contain no definition of the word, and the meaning of section 4090, referring to "offenses against the public peace amounting to felony under the laws of the United States" is not altogether clear.

Applying the rule stated by Judge Hammond in *United States* v. *Coppersmith*, we find that the offense charged here is not declared by statute expressly or impliedly to be a felony. That it was not a felony at common law and Congress has not prescribed its punishment by its common law name; and that Congress has not adopted the statute law of the State of Texas as to this offense.

In 1 Bish. Crim. Law, sec. 622, it is said:

> But an offense shall never be made a felony by any doubtful or ambiguous words, as when an act is prohibited under pain "of forfeiting all that a man has;" or "of forfeiting body and goods;" or "of being at the king's will for body and lands and goods," for such words will only make the offense a high misdemeanor.
>
> So where the provision was that one assaulting another as pointed out should "be deemed a felonious assaulter" and punished by imprisonment, it was held not to create a felony, for the word "felonious" may be applied to the disposition of the mind of the offender as aggravating a misdemeanor and not as descriptive of the offense.

In *United States* v. *Staats* (8 How., 45) Mr. Justice Nelson, speaking for the court, said:

> Felony is the conclusion of law from the acts done with the intent prescribed, and makes part of the punishment, as in the eye of the common law the prisoner thereby becomes infamous and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted.

The offense with which the prisoner in that case was charged was by statute expressly declared to be a felony;

and from the reasoning of the entire opinion we conclude that the moral degradation of the accused is supposed to be greater when he has been convicted of an offense, which Congress has declared to be a felony, than would be the case were he convicted of a misdemeanor; and this, though the penalty imposed by the statute be no greater than in a misdemeanor.

We conclude, then, that although Congress has attached to this offense a degree of punishment which renders the offense "infamous" within the meaning of the fifth amendment to the Constitution, and requires the offender to be proceeded against by indictment or presentment, it has not thereby made the offense a felony. But by declaring the principal offense of smuggling to be a misdemeanor, it has by irresistible implication signified that all offenses arising out of that particular branch of the revenue laws shall be misdemeanors unless otherwise expressly declared.

II.

In giving to the jury the instruction set out on pages 5 and 12.

While this alleged instruction to the jury appears in the record on the pages mentioned, it does not appear in any bill of exceptions in this record; and it could be made a part of the record only by a bill of exceptions. The only two bills of exceptions appearing in this record will be found on pages 13 and 14, and are there designated as "No. 1," in which the action of the court in refusing ten peremptory challenges to the defendant is presented; and "No. 3," which is to the refusal of the court to grant the motion for a new trial "in said cause

upon all the grounds set forth in said motion, which is hereby referred to and prayed to be taken and read as part hereof."

This court has repeatedly held that the refusal of the trial court to grant a motion for a new trial will not be considered on writ of error here.

But on the merits of this assignment we fail to discover any error in the charge complained of. It presents a question which has frequently been before this court; that is, the right of the judge presiding in a Federal court to direct the attention of the jury to any particular matter of fact arising in the case and express his opinion thereon.

The court here reminded the jury that personal interest was liable always to affect the testimony of a witness. Its language, however, was very general. He said:

> You should specially look to the interests which the respective witnesses have in the suit, or in the result. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you, and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence, and in determining how far or to what extent, if at all, it is worthy of credit.

In 2 Thompson on Trials, section 2445, the author in treating of the subject of charging the jury says:

> In the opinion of most American courts it is proper for the judge, in a case where the accused per-

> son has testified as a witness in his own behalf, to advise the jury that in determining the value of his testimony they are at liberty to take into consideration the fact of his interest in the result of the trial, provided he at the same time cautions them that the weight which they shall give to his testimony is exclusively for their determination.

The caution referred to by the author is given in the meager extract from the charge of the judge which is presented here in the words "should be considered by the jury in weighing his evidence, etc."

In what other words and to what further extent it was elsewhere given in the charge of the judge does not appear, for this brief extract is all of the charge with which we are favored in the record.

In *Hicks* v. *United States* (150 U. S., 450 *et seq.*) the manifest objection to the instruction given by the judge in that case was that it contained a suggestion to the jury as to the testimony of the defendant in his own behalf of a "conflict as to material facts between his statements and the statements of the other witnesses *who are telling the truth.*"

Here was a plain discrimination suggested between the testimony of the defendant and the testimony of the other witnesses. The latter are referred to by the judge as "witnesses who are telling the truth." The natural and reasonable inference which the jury would draw from this would be that the defendant was not telling the truth.

As to that portion of the charge relating to the personal testimony of the accused, this court said (p. 452):

> If this were the only objectionable language contained in the charge we might hesitate in saying that

> it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and perhaps a judge can not be considered as going out of his province in giving a similar caution as to the testimony of the accused person.

The court then proceeds to show that upon the evidence in that case this charge to the jury was not warranted.

The evidence, however, in the case at bar, especially that of the defendant on cross-examination, when contrasted with the other testimony in the case, plainly shows the propriety of the instruction here.

III.

In overruling the defendant's motion for a new trial.

As already suggested, a plaintiff in error would not be permitted to let a motion for a new trial, on whatever grounds it may be made, take the place of a bill of exceptions. The office of a bill of exceptions is to import into the record extraneous matter which could not otherwise be recognized or considered by the reviewing court. .

Now, here the motion for a new trial, pages 7 to 10, is put upon ten distinct grounds, each of which might have been assigned as distinct ground of error, and if the facts involved therein were properly presented by bills of exception, could be considered by the court on review.

But it is nowhere certified by the judge who presided at that trial that the charge alleged to have been given by him to the jury was ever given by him, or that the state-

ment alleged to have been made by him to the jury verbally, in the third ground of the motion for a new trial, was ever in fact made by him.

The bills of exception, as we have seen, were numbered 1 and 3. It would appear from this that it was proposed at one time to have bill of exceptions No. 2; but no such bill appears in the record.

Suppose it were true that counsel for plaintiff in error, insisting that the judge had given such a written charge, or made such a verbal statement to the jury as is set out in the motion for a new trial, had embodied these in bill of exceptions No. 2, and had tendered that bill to the court to be signed and enrolled, and the court had declined to sign it on the ground that no such charge or statement had been made to the jury, or, if made, had been instantly recalled; is it not manifest what gross injustice would be done to the judge of a trial court, if these extrinsic matters, which have not been made part of the record by a bill of exceptions, could yet be brought to the attention of this court on review in a motion for a new trial, or in an assignment of errors?

When the court has declared, as it so often has, that it will not consider the action of the court below, on a motion for a new trial, as a ground of error, it must mean that it will not consider any of the grounds on which such motion was made, although those grounds, if made the distinct and substantive ground of error properly assigned, might result in a reversal of the judgment.

IV.

This relates to an alleged oral statement to the jury, by the judge, after the charge was read to them.

We have already stated that this alleged oral statement does not appear from any bill of exceptions in the cause to have been actually made by the court.

The bill of exceptions No. 3, pages 14, 15, giving to it the most liberal construction, amounts to no more than this, that the judge certifies that the defendant made a motion for a new trial, which the court overruled, and to that ruling of the court the defendant excepted, "because the said defendant says that he was, as a matter of law and right, entitled to a new trial in said cause upon all the grounds set forth in said motion, which is hereby referred to, and prayed to be taken and read as part hereof."

Now, if all the grounds of that motion for a new trial had been set out fully in this bill of exceptions, the legal effect would have been only to certify to this court as a matter of fact that those were in truth the grounds on which the motion for a new trial was made. It would not have the effect of a certificate by the trial judge that any one of those grounds was true.

A motion for a new trial on the ground that the court had given a certain instruction to the jury would not be a certificate by the trial judge that he had in fact given such instruction even although he might in a bill of exceptions certify the fact that a motion for a new trial had been made on that ground. He would know and could rest confident in the knowledge, that unless it appeared in the